

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

FILE: B-184328

DATE: July 21, 1976

MATTER OF: Martin Widerker, Eng.

## DIGEST:

1. GAO does not review bid protests involving affirmative responsibility determinations except for actions by procuring officials which are tantamount to fraud or where definitive responsibility criteria set forth in a solicitation allegedly are violated.
2. Agency points out that hiring of incumbent contractor personnel is common business practice in custodial services industry; and that such practice is not contrary to law or business ethics. Accordingly, protest based on allegation that competing offeror has attempted to recruit members of protester's work force is without merit.
3. Where offerors within competitive range are advised in morning of reopening of negotiations and requested to submit best and final offers by that same afternoon, reasonableness of action will not be questioned where all offerors are in fact able to respond within time limit.
4. Where contracting officer determines it to be in Government's interest to allow all offerors within competitive range opportunity to provide data which was omitted in some initial proposals, notwithstanding presence of clause in request for proposals allowing contracting officer to find proposal submitted without such data to be nonresponsive, contracting officer's action was proper.
5. Question of offeror's authority to do business in foreign country cannot be determined conclusively by contracting agency. Contracting officer acted reasonably in awarding contract to offeror where information indicated that awardee was authorized by local authorities to do business. However, contracting officer should have determined whether in attempting to qualify itself to do business offeror has retained original identity so as to be eligible to receive award.

Martin Widerker, Eng. (Widerker) protests the U.S. Army Procurement Agency Europe's (Army's) award of four contracts

for custodial services under requests for proposals DAJA-37-75-R-0499 (RFP-0499), DAJA-37-75-R-0564 (RFP-0564), DAJA-37-75-R-0495 (RFP-0495), and DAJA-37-75-R-0496 (RFP-0496) to the firms of N.R. Neue Raumpflege Gebaudereinigung & Service GmbH & Co. (NR) and Euro Services GmbH (Euro GmbH). The RFPs were issued in mid-May 1975 with performance set to run from July 1, 1975 to June 30, 1976. RFPs -0499 and -0564 were awarded to NR while RFPs -0495 and -0496 were awarded to Euro GmbH.

Widerker protests the awards to NR of RFPs -0499 and -0564 on the following bases: (1) the preaward survey was inadequate; (2) there were ambiguities in the solicitation which caused the protester to make an offer on one basis while the successful offeror made its offer on a different and erroneous basis; and (3) the Army failed to properly notify the protester of the awards to the successful offeror. In the case of RFP -0499, which was awarded subsequent to the filing of the protest, Widerker questions the propriety of the award on the ground of urgency.

The protester's first argument in essence questions NR's responsibility and the Army's affirmative finding thereof. While this Office does review protests involving negative determinations of responsibility to assure that bids or offers are fairly considered, we no longer review affirmative determinations of responsibility except where the protester alleges actions by procuring officials which are tantamount to fraud or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974). Affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform. We note in passing that the record indicates that the Army made a detailed preaward survey of NR. The survey showed NR to be an established, experienced, and qualified custodial firm which had made all necessary preparations for performance in both the Ludwigsburg and Stuttgart areas.

The protester also questions NR's efforts to recruit members of the protester's work force. As the Army points out, the hiring of incumbent contractor personnel is a common business practice in the custodial services industry. Moreover, the Army notes neither law nor business ethics precludes the practice. It appears that NR's recruiting was less successful in the Stuttgart (RFP -0564) area because Widerker asserts that "[i]n desperation it [NR] recruited a variety of questionable characters, so that a storm of

protest came from the Army Occupants of Patch Barracks." The record indicates that the Army in fact experienced difficulties in securing the desired level of performance from NR even to the extent that sums were deducted from NR's invoices, by direction of the contracting officer, for deficiencies in performance. However, notwithstanding the initial difficulties which the Army has had with NR, the contracting officer observes that it is his experience:

"\* \* \* that all firms utilize in performance of custodial contracts a work force composed of part time, transient, untrained workers; and all firms experience a high turnover in employees, other than supervisors and foremen, during the performance period."

The Army further states that it anticipated, in light of the late award, that a new contractor would encounter difficulties in providing full service immediately. The Army noted that Widerker was confronted with similar custodial contract performance difficulties in the Heilbronn area, an area which the protester had itself entered for the first time. Accordingly, we find this aspect of the protest to be without merit.

Widerker's next contention concerns certain portions of RFPs -0499 and -0564, which the protester had noted were ambiguous. In both instances the protester took prompt action to clarify the meaning of the ambiguous specification with Army officials prior to submitting its proposals. Widerker argues that its diligence and the resultant clarifications worked to its detriment. NR, it is alleged, in working up its proposal, had read the ambiguities in the light most favorable to NR, which reading was not the reading the Army had given to the protester.

The Army states that upon being put on notice by Widerker of the ambiguity in RFP -0499, it reexamined the solicitation and concluded that there was indeed a potential source of confusion inherent in the solicitation as it was initially issued. Thereupon all firms within the competitive range were contacted and furnished with a clarified version of the Government's requirement. The same firms were at that time given an opportunity to revise their initial proposals.

Regarding RFP -0564, the contracting officer felt both that NR understood the requirement and that NR had considered the total requirement in determining its proposed total price. In Widerker's protest reference is made to a Telex of June 23, 1975. The date set by the Army for best and final offers on

RFP -0564 was June 20, 1975. The June 23, 1975, Telex was just one of a series of Telexes (in German) which arose out of the following situation: When the contracting officer received the Government price analysis report on June 10, 1975, he found that NR's initial proposal had been rejected by the Army price analyst on the ground that it was incomplete. The NR proposal was, however, the lowest proposal and the contracting officer made a determination that NR should be given an opportunity to clarify its proposal. In this connection, all the solicitations issued for custodial services required the offeror to submit a Cost Data Break Out for the purpose of allowing the contracting officer to assess whether firms in making their proposals had taken all of the requirements set forth in the RFP into consideration. Notwithstanding the fact that the clause allowed the contracting officer to declare an offeror nonresponsive should he submit incomplete data, the contracting officer took the position that, in all cases, firms within the competitive range submitting incomplete data would be contacted and requested to provide it. He took this position because the requirement for cost data was a new one which was not always understood by the custodial firms and, second, because he deemed it in the best interests of the Government to seek clarification, especially from a low offeror, rather than declare the firm nonresponsive.

After several Telexes between itself and NR, the Army, unsure as to whether or not its exchanges with NR had gone beyond mere clarification and had in fact become negotiations, decided to telephonically reopen negotiations on June 20, 1975. It also set 1600 hours that same day as the deadline for best and final offers. Both the protester and NR replied, but neither confirmed a best and final price at that time. By Telex of June 23, 1975, NR did confirm its price.

As the contracting officer notes the June 23, 1975, Telex changed nothing. It merely confirmed what he already knew on June 20, 1975. The record evidences considerable confusion on the part of the German nationals involved regarding exactly what the proper solicitation procedures were and what role the Army expected them to play in relation to the procedures. An example is provided by the following excerpt from the record:

"On Saturday, 21 June 1975, I was in receipt of two phone calls from the Widerkers. The first was at approximately 0930 hours by Mr. Widerker which was handled by Mr. Yasi, Deputy Chief, Procurement Division. Mr. Widerker wanted to

know why Mrs. Pitschke had contacted him earlier during the preceding week and requested a 'best and final' not later than 1600 hours, 20 June at Patch Barracks. Mr. Yasi explained that this was the normal method of conducting negotiations, and that this year since we were now on standard specifications and that some firms required clarification we were contacting prospective offerors in this regard."

In this context we do not find that the Army was arbitrary in its handling of the negotiations in question. The protester and the other offerors were able to respond in time to the request for best and final offers.

The next ground of protest is the issue of whether the Army complied with applicable regulations in its notification to the protester that NR had been awarded both contracts.

As background to a consideration of the events surrounding the Army's awards it should be noted that Widerker's contract to provide the Army with custodial services in the Ludwigsburg area was set to expire on Monday, June 30, 1975. Widerker had been the incumbent custodial contractor in the Ludwigsburg area for a number of years. On June 27, 1975, the protester was informed that he was not the successful offeror on RFP -0499. The protester contends that the late notification of award worked a hardship on both it and NR; on the protester to the extent that it was given only one working day to prepare for contract expiration and on NR to the extent that it received so little time to prepare for performance. Widerker was under the impression that the successful offeror would receive 10 days notice prior to award.

However, there was in fact no such stipulation in the solicitation documents. Moreover, Widerker was promptly notified by telephone of the award to NR. Therefore, we find no reason to question the Army's actions in this respect.

The protester also questions the contracting officer's determination to award RFP -0499 notwithstanding the protest on the ground of urgency. Widerker points out that the required janitorial services under RFP -0499 covered a total cleaning area of 15,000 square meters, 14,000 square meters of which consisted of school buildings that would be closed for the summer, the balance consisting of operational, administrative areas. The contracting officer in his June 27, 1975, findings and determination found as follows:

"The subject RFP is for custodial services for U.S. dependent schools at Pattonville. Services are urgently required as the present contract expires on 30 June 1975. Since a new contractor must begin performance immediately in order to avoid any lapse in services that would create a health hazard, and since there is no 'in house' capability to perform these services temporarily, performance of these services would be unduly delayed [ASPR] (2-407.8(b)(3)(ii)) by failure to make award promptly. It is to be noted that the school area is to be completely cleaned, floors swept and walls cleaned during the summer vacation period; therefore, it is vital that performance begin on 1 July."

In addition, the contracting officer offers as a further justification that:

"\* \* \* certain areas of the school are used for summer classes and community activities and require daily performance of cleaning services in these areas. Since this is a matter of health and welfare a determination of essentiality was properly made."

Thus, the record shows that there was a need to perform a substantial portion of the services while the schools were empty and before they reopened.

For the reasons stated, Widerker's protest of the awards to NR is denied.

Widerker's protest of the award to Euro GmbH reiterates the arguments which we have already considered and decided in the above protest of the award to NR. There is, however, an additional allegation that Euro Services had not complied with requirements to do work in Germany, and therefore the contractor should not be permitted to perform these contracts because of its failure to comply with German law. The record however, shows otherwise.

During the month of June 1975 the Army received offers from Euro Inc. on both RFPs -0495 and -0496. In both instances, the offers were on Euro Inc.'s, Dunn, North Carolina, stationery and were signed by a Mr. Franklin in his capacity as Euro Inc.'s "Special Representative." The Mannheim

Chamber of Commerce informed the Army on June 23, 1975, that Euro Inc. had not been officially registered to do business in Germany. On June 25, 1975, a conference was held with Euro Inc. representatives. The following is an extract of the portion of the Army preaward survey which treats the conference:

"On 25 June 1975 prospective contractor with legal counsel presented documentary evidence in the office of USAPAE Procurement Judge Advocate, that the firm had been registered previously that day as a legal entity under German law, with official address given as Euro Services Germany GmbH, \* \* \* Heidelberg \* \* \*. In effect Euro Services Germany is now established as an independent legal partnership under German law (prime members Robert P. Stallings and Happy I. Franklin), and is no longer a subsidiary or branch of Euro Services, Inc."

With the above evidence in hand, and presumably upon the advice of counsel, the contracting officer proceeded that same day to award both contracts to Euro Services, GmbH, of Heidelberg, Germany.

In this regard, Army counsel, states as follows:

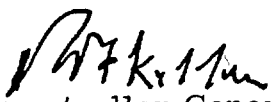
"Also discussed at this meeting with the attorneys for Euro Services were the consequences of a default termination should Euro Services subsequently be unable to perform because of not possessing the proper authorization to do business. This right of the Government was recognized for Euro Services but the possibility dismissed for the reasons as previously stated that their firm was authorized to do business in Germany.

"In view of the above it is submitted that the contracting officer's actions were proper in awarding to Euro Services \* \* \*. The contracting officer had obtained reasonable documentation and assurances from Euro Services and its attorneys that the firm was authorized to do business in Germany. Further the contracting officer had the assurance provided by

the 'Authorization to Perform' clause that the Government's interests would be protected should the contractor default in its performance for want of proper authorization to perform. For the contracting officer not to award to Euro Services in this situation would require the contracting officer to be in a position to authoritatively determine that Euro Services was not authorized to do business in Germany. The contracting officer could not make such a determination - as recognized by the Comptroller General such a question if it is ever placed in issue may have to be determined by a court. It is pertinent to note in this respect that there presently is to our knowledge no court challenge to the right of Euro Services to perform in Germany, and the company is in fact performing."

We agree with Army counsel's assessment. As we stated in 51 Comp. Gen. 377 (1971), the validity of a particular state tax or license as applied to the activities of a Federal contractor often cannot be determined except by the courts. We believe the same situation exists in the case of an offshore procurement. Therefore, it seems to us the contracting officer acted reasonably in awarding these contracts to the otherwise eligible offeror, based on the information he had obtained. In this connection, it appears to us that in the process of attempting to qualify itself, the low offeror may have undergone a change in identity so that the firm receiving the award differed from the entity submitting the offer. Absent a corporate merger or acquisition, or the sale of an entire business or the transfer of the entire portion of a business embraced by the contract, this circumstance would preclude an award. This issue was not argued before our Office. However, we are bringing it to the attention of the Secretary of the Army for consideration in future similar procurements.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States